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BEFORE THE ARIZONA CORPORATION COMMISSION

2011 APR -1 P 2:32

COMMISSIONERS

AZ CORP COMMISSION  
DOCKET CONTROL

GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

In the matter of:

David E. Walsh and Lorene Walsh,  
respondent and spouse, doing business as New  
York Networks, Inc., a dissolved Delaware  
corporation formerly known as Jubilee  
Acquisition Corporation and as Caliper  
Acquisition Corporation, The New York Network,  
Inc., a revoked Nevada corporation, and The New  
York Networks, Inc., an entity of unknown origin,

Christopher A. Jensen and Julie Shayne Jensen,  
respondent and spouse,

Rodolfo Preciado and Jane Doe Preciado  
respondent and spouse,

Respondents.

DOCKET NO. S-20726A-10-0062

**SECURITIES DIVISION'S REPLY TO  
RESPONDENTS' OPPOSITION TO THE  
SECURITIES DIVISION'S MOTION  
TO ALLOW TELEPHONIC TESTIMONY**

Arizona Corporation Commission

**DOCKETED**

APR -1 2011

DOCKETED BY

*MM*

The Division submits its reply in support of its March 24, 2011, Motion To Allow Telephonic Testimony ("Motion") of an important out-of-state witness to be called during the evidentiary hearing scheduled to begin on July 11, 2011, and respectfully requests that the Motion be granted.

As evidenced by the Jensen and Preciado Respondents' (collectively "Respondents") March 25, 2011, Opposition ("Opposition"), there is no factual, legal or equitable reason for the administrative law judge ("ALJ") to refuse to allow victim investor Tona Bowen to telephonically testify during the evidentiary hearing.

1           A.     **Respondents Failed to Controvert the Division's Authority or Establish Undue**  
2                 **Prejudice.**

3           Respondents do not dispute, and there can be no question, that in this forum the established  
4           test for whether allowing telephonic testimony comports with due process is whether: (1) personal  
5           attendance by a witness will present an undue hardship; (2) telephonic testimony will not cause  
6           undue prejudice to any party; and, (3) the proponent of the telephonic testimony pays for the cost of  
7           obtaining the testimony telephonically. (*See, Motion, pp. 2:17-3:5; Opposition, p. 3:1-4*).

8           As a threshold matter, "undue prejudice" is generally defined as that "harm resulting from a  
9           fact-trier's being exposed to evidence that is persuasive but inadmissible (such as evidence of prior  
10          criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned."  
11         Blacks Law Dictionary (9<sup>th</sup> Edition 2009).

12          Applied here, all three factors support the Division's Motion:

- 13         1. Ms. Bowen is not simply "busy." Rather, Ms. Bowen lives out-of-state. Ms. Bowen also  
14         recently underwent a major surgery. As a result of this surgery, Ms. Bowen used up all or a  
15         substantial portion of her accumulated work leave time at her job. To require Ms. Bowen to  
16         travel to Phoenix and miss additional days of work for which she is not likely to be  
17         compensated would, without question, create an undue burden for her. She is not wealthy,  
18         and recently relocated her residence. Moving a residence to another state is extremely  
19         expensive. Requiring Ms. Bowen to incur travel related expenses would cause her undue  
20         burden. Requiring her to request additional time off from her employer and be absent from  
21         her employment without compensation would effectively preclude her from testifying as to  
22         the facts of her transactions with Respondents.
- 23         2. If the ALJ allows Ms. Bowen to testify via telephone, Respondents will have the  
24         opportunity to cross examine her, in part, with the documents already provided to  
25         Respondents by the Division. Ms. Bowen's testimony is anticipated to be neither complex  
26         nor lengthy. The facts Ms. Bowen will testify to are not reasonably in dispute (*i.e.*, the  
            purchase dates and price of the investments, etc.). In addition to the plain language of the

1 Division's February 19, 2010, Notice, Ms. Bowen purchased her investments via  
2 Respondent Christopher A. Jensen such that it is hard to imagine exactly how Respondents  
3 would not have a firm grasp as to her expected testimony. Respondents have not  
4 demonstrated that they will experience "undue" prejudice merely because a single Division  
5 proposed witness will testify via the telephone.

6 3. The Division will pay the costs of the telephonic testimony.

7 Respondents' Opposition also ignores and/or fails to distinguish the applicable securities  
8 enforcement authority cited in the Division's Motion that recognizes and approves the use of  
9 telephonic testimony in administrative hearings like this one to introduce probative evidence. *See,*  
10 *e.g., In the matter of Theodore J. Hogan and Associates, et al.,* Docket No. S-20714A-09-0553, *In*  
11 *the matter of Edward A. Purvis, et al.,* Docket No. S-20482A-06-0631; *In the matter of Yucatan*  
12 *Resorts, Inc., et al.,* Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services,*  
13 *Corporation et al.,* Docket No. S-03177A-98-000; *see also Motion, pp. 3:6-4:18* (additional  
14 persuasive case law, including *T.W.M Custom Framing v. Industrial Commission of Arizona, C&C*  
15 *Partners, LTD v. Dept. Industrial Relations, Babcock v. Employment Division, & W.J.C. v. Country*  
16 *of Vilas*).

17 Because the Division has established undue hardship if Ms. Bowen is required to personally  
18 attend the hearing, and because Respondents conversely cannot establish any resulting undue  
19 prejudice, the Division's request for Ms. Bowen to testify telephonically should be granted.

20 **B. Respondents' Due Process Case Law is Inapposite.**

21 Respondents claim that allowing the telephonic testimony of Ms. Bowen will violate  
22 Respondents' due process rights under the United States Constitution because the Division is  
23 seeking an order: (a) directing Respondents to pay restitution and administrative penalties; and, (b)  
24 preventing Respondents "from earning a living in their chosen field." (**Opposition, p. 2:3-10**).  
25 Respondents are incorrect.

1       The funds Respondents' improperly solicited from the investors in this case cannot be  
2 considered to be Respondents' "property." The Division submits that Respondents' so-called  
3 property actually belongs to the victim investors, and was obtained illegally. Respondents have  
4 failed to cite any authority holding that Respondents have a due process interest in ill-gotten gains.

5       Further, the Division does not put people out of business, or prevent anyone from working  
6 in their "chosen field." Rather, the Division seeks to prevent individuals from violating the Arizona  
7 Securities Act ("Act"). Thousands of Arizona citizens make their living offering and selling  
8 investments without violating the Act. Again, Respondents fail to cite any authority holding that  
9 they have a due process right to violate the Act. Further, so long as Respondents can conduct their  
10 business without violating the Act, there can be no argument that the Division is precluding  
11 Respondents from their so-called "chosen field" of business.

12       In support of their due process argument, Respondents cite a myriad of legally and factually  
13 inapposite cases that have no bearing on the Act or the rules applicable to this *administrative*  
14 matter. For instance, Respondents cite the 1959 case of *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct.  
15 1400 (1959), in which an aeronautical engineer employed by private manufacturer which produced  
16 goods for the armed services was discharged because the U.S. government had revoked his security  
17 clearance to classified data because he was "communist" and, as a result, future employment by the  
18 engineer with similar employers was "closed" to him. Although the employee had been afforded a  
19 hearing of a dubious nature in which the employee presented evidence, the government had  
20 presented no witnesses, or the confidential witness interview reports from which the government  
21 had based its security clearance decision. *Greene*, 360 U.S. at 475-479. The *Greene* Court  
22 reversed the denial of the employee's security clearance because the employee had not been  
23 afforded an opportunity to confront and question the persons who had provided the government  
24 with the statements, or the government employees who had recorded such statements.

25       Unlike the employee in *Greene*, Respondents have already had the opportunity to review all  
26 of the Division's documentary evidence, and they will be afforded the opportunity to cross examine

1 Ms. Bowen, as well as the Division's investigator and other witnesses live and in-person. The  
2 *Greene* decision does not state that allowing telephonic testimony in administrative hearings like  
3 this one violates Respondents' due process rights. Further, the *Greene* case does not purport to  
4 overrule or nullify the legal authority cited by the Division in support of its Motion. (**See, Motion,**  
5 **pp. 2:17 to 5:9**) Thus, Respondents' reliance on the *Greene* decision is misplaced.

6 Respondents next cite *Goldberg v Kelly*, 397 U.S. 254 (1970), for the proposition that due  
7 process generally requires that evidence be disclosed by one party, so that the other has the  
8 "opportunity to prove that it is not true [sic]" and to confront and cross-examine adverse witnesses.  
9 (**Opposition, p. 3:22-27**). *Goldberg* involved the denial of continued benefits by welfare recipients  
10 without the opportunity to: (a) "appear personally with or without counsel before the official who  
11 finally determines continued eligibility;" or (b) "present evidence to that official orally, or to  
12 confront or cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 268-270. Allowing one  
13 Division witness to testify via the telephone will still enable Respondents' attorneys to cross  
14 examine and confront the witness. Thus, Respondents' reliance on the *Goldberg* decision is  
15 equally misplaced.

16 Respondents also cite the *criminal* case of *Arizona v. Moore*, 203 Ariz. 515, 517, 56 P.3d  
17 1099 (App. 2002), for the proposition that all persons in proceedings like this one are entitled to  
18 confront witnesses face-to-face. (**Opposition, p. 4:4-21**). In reality, the *Moore* decision involved a  
19 defendant charged with aggravated driving under the influence ("DUI") because he was DUI while  
20 his driver's license was suspended. *Moore*, 203 Ariz. at 517, 56 P.3d at 1100-01. The defendant in  
21 *Moore* argued that he did not know his license had not been restored because the judge in the prior  
22 license revocation case had told the defendant in the hallway that the defendant would be given a  
23 temporary license. *Id.* The prosecution wanted the judge to testify by telephone due to his "busy  
24 schedule." The trial court judge allowed the previous judge to testify via the telephone that the trial  
25 court judge did not have private conversations in the hallways. *Id.* On appeal, the *Moore* Court  
26 ruled that mere inconvenience to the judge/witness was not in and of itself a sufficient reason to

1 dispense with the defendant's general right to confront the adverse witness face-to-face. *Id.*, at 518,  
2 56 P.3d at 1102-03.

3 Applied here, the *Moore* decision is inapplicable because this is an administrative case, not  
4 a criminal case involving a criminal defendant's sixth amendment right to confront the witnesses  
5 against him.<sup>1</sup> Put another way, the ALJ will not be sentencing Respondents to prison or jail at the  
6 conclusion of this matter. Rather, the ALJ will seek to fashion an appropriate remedial resolution  
7 in a cost-effective, speedy and fair manner inherent to administrative proceedings like this one. To  
8 effectuate that purpose, the legislature provided for streamlined proceedings and relaxed  
9 application of the formal rules of evidence. Specifically, A.R.S. § 41-1062(A)(1)<sup>2</sup> provides for  
10 informality in the conduct of contested administrative cases. The evidence submitted in an

11 <sup>1</sup> Respondents cite yet another criminal case *Maryland v. Craig*, 497 U.S. 836, 843, 110 S.Ct. 3157 (1990)  
12 for the proposition that "[t]he personal testimony of a witness may only be dispensed with 'where denial of  
13 such a confrontation is necessary to further an important public policy and only where the reasonability of  
14 the testimony is otherwise assured.'" (**Opposition, p.4:13-18**). The United States Supreme Court then  
15 reasoned that the adversarial process, in whole, including the right to cross examine a witness ensures the  
16 reliability of out-of-court testimonial evidence. *Maryland v. Craig*, 497 U.S. at 845-846, 110 S.Ct. at 3163-  
17 3164. Not only did that case involve alleged criminal child sexual offenses and assault and battery charges  
18 against a preschool operator, but it further held that the confrontation clause did not prohibit a child witness  
19 in the child abuse case from testifying against the defendant outside her physical presence by one-way  
20 closed circuit television. Again, this is an administrative, not a criminal forum, and protecting the investing  
public from unregistered securities salesman, in part, by allowing telephonic testimony under the facts of  
this case clearly serves an important public purpose as referenced in the *Maryland v. Craig* case. See e.g.,  
*Siporin v. Carrington*, 200 Ariz. 97, 98, 23 P.3d 92, 93 (App. 2001)("By legislative design, the Arizona  
Securities Act protects the public by preventing dishonest promoters from selling financial schemes to  
unwary investors who have little or no knowledge of the realistic likelihood of the success of their  
investments," and noting that Arizona courts "will depart from those federal decisions that do not advance  
the Arizona policy of protecting the public from unscrupulous investment promoters."), *reconsideration*  
*denied* (May 31, 2001), *review denied* (Dec. 4, 2001). Further, the Preamble to the Act states:

21 The intent and purpose of this Act is for the protection of the public, the preservation of fair and  
22 equitable business practices, the suppression of fraudulent or deceptive practices in the sale or  
23 purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive  
practices in the sale or purchase of securities. This Act shall not be given a narrow or restricted  
interpretation or construction, but shall be liberally construed as a remedial measure in order not  
to defeat the purpose thereof.

24 <sup>2</sup> A.R.S. § 41-1062(A)(1) states that "A hearing may be conducted in an informal manner and without  
25 adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the  
26 hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds  
for reversing any administrative decision or order providing the evidence supporting such decision or order  
is substantial, reliable and probative."

1 administrative hearing need not rise to the level of formality required in a judicial proceeding, as  
2 long as it is “substantial, reliable and probative.” In addition, the Commission promulgated rules of  
3 practice and procedure to ensure just and speedy determination of all matters presented to it for  
4 consideration. *See, e.g.,* A.A.C. R14-3-101(B)<sup>3</sup>; *also*, R14-3-109(K)<sup>4</sup>. Applied here, Ms. Bowen’s  
5 testimony will be substantial, reliable and probative.

6 Further, the Arizona Supreme Court also recently held that telephonic testimony of an  
7 evaluating physician in an involuntary mental health *commitment proceeding* did not violate the  
8 patient’s due process rights despite the fact such testimony resulted in a “massive curtailment” of  
9 the patient’s liberty. *See, In re MH-2008-000867*, 225 Ariz. 178, 181, 236 P.3d 405, 409 (2010)  
10 (reasoning that 6th Amendment “confrontation clause” applied only to criminal prosecution cases,  
11 not to civil or even mental health commitment proceedings; “Involuntary commitment involves a  
12 significant curtailment of individual liberty. In circumstances like those presented here, however,  
13 allowing telephonic testimony serves important governmental interests and does not significantly  
14 increase the risks of an erroneous deprivation. Although Dr. F was not physically present in the  
15 courtroom, he was subject to full cross-examination.”).<sup>5</sup>

16 <sup>3</sup> A.A.C. R14-3-101(B) states that the applicable rules “shall be liberally construed” to secure the “just and  
17 speedy” determination of this matter.

18 <sup>4</sup> A.A.C. R14-3-109(K) states, in part, that “In conducting any...hearing, neither the Commission nor any  
19 officer or employee thereof shall be bound by the technical rules of evidence, and no informality in any  
20 proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation  
made, approved or confirmed by the Commission.” The rule further states that adherence to the rules of  
evidence “may be relaxed in the discretion of the Commission or presiding officer when deviation from the  
technical rules of evidence will aid in ascertaining the facts.”

21 <sup>5</sup> Respondents do cite to the *In re MH-2008-000867* decision; however, they incorrectly claim that it relates  
22 to: (a) a *judge’s* telephonic testimony; and (b) the appropriateness of a continuance until the witness could  
be presented in person. (**Opposition**, pp. 5:25 to 6:5; p. 7:8-10). However, that case involves an evaluating  
23 *physician’s* telephonic testimony, and the court did not make a testimony-based “continuance” ruling,  
despite noting that an involuntary commitment proceeding statute allowed for a continuance if requested by  
24 the patient. *See, In re MH-2008-000867*, 225 Ariz. at 179-180, 236 P.3d 405. Further, the *In re MH-2008-*  
*000867* decision itself cites the remaining case relied on by Respondents, *In re MH-2004-001987*, in which  
25 the Arizona Court of Appeals allowed the telephonic testimony of a doctor because the telephonic testimony  
was inherently reliable. *See, In re MH-2004-001987*, 211 Ariz. 255, 260, 120 P.3d 210, 215 (App.  
2005)(court found that lack of face-to-face confrontation did not violate patient’s due process rights because  
26 the telephonic witness’s identity was made by person with knowledge of the witness’s voice, the telephonic  
witness was available for cross-examination, and patient’s counsel had an opportunity to interview the  
witness before the hearing).

1 Based on the foregoing, allowing the telephonic testimony of investor victim Ms. Bowen  
2 will not violate Respondents' due process rights.<sup>6</sup> The Division's Motion sets forth ample  
3 uncontroverted authority demonstrating that allowing limited, telephonic testimony under the facts  
4 of this case does not violate Respondents' due process rights.

5 **C. Respondents' Remaining Arguments Lack Merit.**

6 Claiming that telephonic testimony is not reliable, Respondents next cite to the  
7 recommended "civil" jury instructions for the various reasons they need to confront Ms. Bowen  
8 face-to-face. (**Opposition, pp. 5:25-7:1**).<sup>7</sup> Specifically, Respondents claim that allowing Ms.  
9 Bowen to testify telephonically will preclude the ALJ from determining, "the quality of her  
10 memory or her potential motives, biases or prejudices." (*Id.*, p. 6:25-26).

11 The Division submits, however, that the ALJ will be able to give Ms. Bowen's testimony  
12 the weight it deserves, and that he does not need the assistance of the recommended civil jury  
13 instructions to evaluate Ms. Bowen's telephonic testimony.

14 The Division acknowledges that Ms. Bowen's physical absence will not allow observation of  
15 the her demeanor, facial expressions, etc.; however, as noted in the Division's Motion, courts have  
16 routinely acknowledged that telephonic testimony in administrative proceedings is permissible and  
17 consistent with the requirements of procedural due process.

18  
19  
20  
21 <sup>6</sup> One Arizona court even noted that the telephonic medium "preserves paralinguistic features such as pitch,  
22 intonation, and pauses that may assist the ALJ in making determinations of credibility." *T.W.M. Custom  
Framing v. Industrial Commission of Arizona*, 198 Ariz. 41, 48, (2000).

23 <sup>7</sup> The Arizona rules of civil procedure and any related jury instructions based on first person witness  
24 evaluation do not apply to these administrative proceedings. See, e.g., *Pacific Gas and Electric Company*,  
25 746 F.2d 1383, 1387 (9<sup>th</sup> Cir. 1984); *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28,  
26 33 (7<sup>th</sup> Cir. 1977); *National Labor Relations Board v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7<sup>th</sup> Cir.  
1961); *In re City of Anaheim, et al.* 1999 WL 955896, 70 S.E.C. Docket 1848 (the federal rules of civil  
procedure do not properly play any role on the issue of discovery in an administrative proceeding). This is  
an administrative case governed by the Act, the Rules of Practice and Procedure Before the Commission,  
and the Arizona Administrative Procedures Act.



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